

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 515, 538, and 552

[GSAR Case 2016-G506; Docket No. 2016-0016; Sequence No. 1]

RIN 3090-AJ75

**General Services Administration Acquisition Regulation (GSAR);
Federal Supply Schedule, Order-Level Materials**

AGENCY: Office of Acquisition Policy, General Services Administration.

ACTION: Proposed rule.

SUMMARY: The General Services Administration (GSA) is proposing to amend the General Services Administration Acquisition Regulation (GSAR) to clarify the authority to acquire order-level materials when placing a task order or establishing a Blanket Purchase Agreement (BPA) against a Federal Supply Schedule (FSS) contract. This proposed rule seeks to provide clear and comprehensive implementation of the ability to acquire order-level materials through the FSS program to create parity between FSS contracts and commercial indefinite-delivery/indefinite-quantity (IDIQ) contracts, reduce the need to conduct less efficient procurement transactions, lower barriers of entry to the federal marketplace and make it easier to do business the federal government.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at one of the

addressees shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to GSAR Case 2016-G506 by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments by searching for "GSAR Case 2016-G506." Select the link "Comment Now" that corresponds with GSAR Case 2016-G506. Follow the instructions provided on the screen. Please include your name, company name (if any), and "GSAR Case 2016-G506" on your attached document.

- Mail: General Services Administration,
Regulatory Secretariat Division (MVCB), ATTN: Ms. Flowers,
1800 F Street, NW., 2nd Floor, Washington, DC 20405.

Instructions: Please submit comments only and cite GSAR Case 2016-G506, in all correspondence related to this case. All comments received will generally be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Leah Price, Procurement Analyst, at 703-605-2558, or Mr. Curtis Glover, Sr., Procurement Analyst, at 202-501-1448, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite GSAR Case 2016-G506.

SUPPLEMENTARY INFORMATION:

I. Background

GSA is proposing to amend the General Services Administration Acquisition Regulation (GSAR) to establish special ordering procedures (per FAR 8.403(b)). These special ordering procedures clarify the authority to acquire order-level materials when placing an order or establishing a BPA against an FSS contract. Currently, most commercial indefinite-delivery/indefinite-quantity (IDIQ) contracts provide the flexibility to easily acquire order-level materials; however the FSS program does not. This proposed rule aims to create parity between the FSS program and other commercial IDIQs while also ensuring an appropriate set of controls or safeguards are put in place.

Improving the acquisition of order level materials through the FSS program was expressly cited in the Office

of Federal Procurement Policy's roadmap for simplifying the federal procurement process. (See Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings, available at

<https://www.whitehouse.gov/sites/default/files/omb/procurement/memo/simplifying-federal-procurement-to-improve-performance-drive-innovation-increase-savings.pdf>.)

Providing the same flexibilities in the FSS program that are currently authorized for commercial IDIQ vehicles will help to reduce contract duplication and the associated administrative costs and inefficiencies for agencies. Simultaneously, it will reduce transaction costs for contractors, including small businesses, by eliminating the need for FSS contract holders to compete for and enter into additional contracts for this ancillary work. The Government Accountability Office (GAO) reports the costs of being on multiple contract vehicles ranged from \$10,000 to \$1,000,000 due to increased bid and proposal, and administrative costs.

This proposed rule would achieve parity for the FSS program by providing further clarification in the GSAR of

regulatory changes made by the Federal Acquisition Regulatory Council in years past to overcome the holdings in a Court of Federal Claims decision, *ATA Defense Industries, Inc. v. United States*, 38 Fed. Cl. 489 (1997) and a GAO opinion, Pyxis Corporation, B-282469; B-282469.2. These decisions were issued at a time when there was no guidance in the FAR about open market items and served as impetus for opening Federal Acquisition Regulation (FAR) Case 1999-614, bringing the guidance from the FSS Contractor Guide into the FAR. The FAR Case stated:

It had been common practice to add "incidental" non-FSS items to FSS orders for administrative convenience. However, on July 15, 1999, the General Accounting Office (GAO) ruled in a protest that agencies "may no longer rely on the 'incidentals' test to justify the purchase of non-FSS items in connection with an FSS buy; where an agency buys non-FSS items, it must follow applicable acquisition regulations" (Pyxis Corporation, B-282469; B-282469.2). Therefore, it is proposed that a paragraph (d) be added to FAR 8.401, General, which would permit the addition of "open market (noncontract)" items to a FSS blanket purchase agreement or task or delivery order only if "(1) all applicable acquisition regulations have been followed (e.g., publicizing ([FAR] Part 5), competition requirements ([FAR] Part 6), acquisition of commercial items ([FAR] Part 12), and contracting methods ([FAR] Parts 13, 14, and 15)); (2) the ordering office contracting officer has determined the price for the open market items is reasonable; and (3) the items are clearly labeled as open market (noncontract) items on the order."

This FAR Case was finalized and included in Federal Acquisition Circular 2001-08, effective July 29, 2002. With subsequent changes, this text moved from FAR 8.401 to its present location in FAR 8.402.

Separately, FAR case 2003-027, Additional Commercial Contract Types, published in the Federal Register at 71 FR 74667 on December 12, 2006, expressly provided the authority to acquire order-level materials under commercial contracts. The case extended this authority to all commercial IDIQ contract vehicles, including contracts awarded pursuant to FAR part 12 and orders awarded pursuant to FAR subparts 16.5 and 8.4.

Alternate I of FAR clause 52.212-4 Contract Terms and Conditions - Commercial Items was explicitly developed for contract vehicles where Time and Materials (T&M) or Labor-Hour (L-H) orders are contemplated. It defines "materials" to include direct materials, other direct costs, subcontracts, and indirect costs, and provides a means to acquire these materials within the scope of the FSS contract. It includes detailed instructions for the handling of each, none of which involves the competitive procedures required by FAR 8.402(f).

Despite this clarification, FAR 8.402(f), which addresses "open market items" that are not on FSS, has been widely interpreted to mean that ordering activity Contracting Officers must conduct a separate open market competition for any and all materials not specifically awarded on the underlying FSS contract. As a result, FSS ordering activities have struggled with how to properly handle orders for which the exact items and quantities of materials is unknown. Years of confusion have, in turn, led to the creation of elaborate workarounds and the application of inconsistent policies and procedures.

Providing clear and comprehensive implementation of this authority in the GSAR will result in parity regarding the ability to acquire order level materials from the FSS program and other commercial IDIQs. As a result, agencies will be able to further utilize the FSS program to meet their requirements rather than conducting separate open market procurements or further contributing to contract duplication through creating new commercial IDIQs that have a similar scope to existing FSS offerors, but that allow for order level materials.

II. Discussion and Analysis

Amendments to GSAR parts 515, 538, and 552 are proposed by this rule. Specifically, GSA is proposing the following amendments:

- Add to GSAR 515.408(c) that "offerors are not required to complete the commercial sales practices disclosure for order-level materials.
- Add a new GSAR subpart 538.71, Order-Level Materials, which clarifies the authority to acquire order-level materials when placing a task order or establishing a BPA against an FSS contract. This subpart defines order-level materials and lists the applicable Federal Supply Schedules that authorized the use of order-level materials. GSA will issue guidance to its contracting officers outlining the procedures for structuring these Federal Supply Schedules and how to administer FSS contracts where order-level materials are authorized.
- Add instructions in new GSAR subpart 538.71 for GSA contracting officers to use FAR clause 52.212-4 Alternate I in Federal Supply Schedules authorizing the use of order-level materials, with the following instructions for the clause fill-ins:

- Insert "Each order must list separately subcontracts for services excluded from the FSS

Schedule Hourly Rates" in FAR clause 52.212-4(e)(iii)(D).

- o Insert "Each order must list separately elements of other direct charge(s) for that order." in FAR clause 52.212-4(i)(1)(ii)(D)(1).

- o Insert "none" in FAR clause 52.212-4(i)(1)(ii)(D)(2).

- o GSA is especially interested in comments on the clause fill-in instructions.

- Add a new GSAR clause 552.238-XX, Special Ordering Procedures for the Acquisition of Order-Level Materials, which clarifies the authority to acquire order-level materials when placing a task order or establishing a BPA against an FSS contract. This new clause should be read as a special ordering procedure, as authorized in FAR 8.403(b). Operationally, it should be understood as an addition to the ordering procedures outlined in FAR 8.404(h). This new clause includes the special ordering procedures to be used when order-level materials are authorized controls that GSA is establishing when authorizing the use of "order-level materials". These controls include—

- Prohibiting order-level materials from being the primary basis of the order;
- Limiting the total value of order-level materials to 33 percent of the overall order value;
- Requiring order-level materials to be purchased under a separate Special Item Number (SIN) to enable GSA to monitor the sales for order-level materials and evaluate the appropriate usage;
- Requiring the ordering activity to follow FAR 8.404(h) prior to placing an order including order-level materials;
- Requiring contractors proposing order-level materials as part of a solution to submit a minimum of three quotes for each order-level material above the micro-purchase threshold. One of these three quotes may include materials furnished by the contractor under FAR 52.212-4 Alternate I(i)(1)(ii)(A). The contractor shall submit the information to the ordering activity contracting officer or

provide rationale for why three quotes cannot be obtained;

- Requiring the ordering activity contracting officer to determine all prices for order-level materials are fair and reasonable prior to placing an order; and
- Including controls to ensure any ceiling increase has been appropriately justified and approved in accordance with FAR 8.405-6.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This proposed rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

GSA does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S. 601, et seq., because the rule merely clarifies the authority to acquire order-level materials when placing a task order or establishing a BPA against an FSS contract; however, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared consistent with 5 U.S.C. 603, and is summarized as follows:

This proposed rule amends the GSAR to clarify the authority to acquire order-level materials when placing a task order or establishing a BPA against an FSS contract. Currently, most commercial indefinite-delivery/indefinite-quantity (IDIQ) contracts provide the flexibility to easily acquire order-level materials; however the FSS program does not.

Currently there are 13,850 small businesses that have GSA Schedule contracts. While the rule is expected to have a beneficial impact on these contractors by reducing bid and proposal preparation costs and simplifying the process for selling order-level materials to FSS customers, GSA does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule merely clarifies the authority to acquire order-level materials when placing a task order or establishing a BPA against an authorized FSS contract.

The proposed rule imposes no reporting, recordkeeping, or other information collection requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternatives to the rule. The impact of this rule on small business is not expected to be significant.

The Regulatory Secretariat Division will be submitting a copy of the Initial Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. GSA invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

GSA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (GSAR Case 2016-G506) in correspondence.

V. Paperwork Reduction Act

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR parts 515, 538, and 552.

Government procurement.

Dated: September 2, 2016

Jeffrey A. Koses
Senior Procurement Executive,
Office of Acquisition Policy,
Office of Government-wide Policy,
General Services Administration.

Therefore, GSA proposes to amend 48 CFR parts 515, 538, and 552 as set forth below:

1. The authority citation for 48 CFR parts 515, 538, and 552 continues to read as follows:

Authority: 40 U.S.C. 121 (c).

PART 515—CONTRACTING BY NEGOTIATION

2. Amend section 515.408 by adding a sentence to the end of paragraph (c) introductory text to read as follows:

515.408 Solicitation provisions and contract clauses.

* * * * *

(c) * * * Offerors are not required to complete the commercial sales practices disclosure for order-level materials (See subpart 538.71).

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PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING

3. Add subpart 538.71 to read as follows:

Subpart 538.71—Order-level Materials

538.7100 Definitions.
538.7101 Applicability.
538.7103 Contract clauses.

Subpart 538.71—Order-level Materials

538.7100 Definitions.

Order-level materials means supplies and/or services acquired in direct support of an individual task or delivery order placed against a Federal Supply Schedule (FSS) contract, when the supplies and/or services are not known at the time of Schedule contract award. The prices of order-level materials are not established in the FSS contract. Order-level materials are not open market items discussed in FAR 8.402(f).

538.7101 Applicability.

Order-level materials are authorized under all of the following:

- (a) Federal Supply Schedule 03 FAC.
- (b) Federal Supply Schedule 56.
- (c) Federal Supply Schedule 70.
- (d) Federal Supply Schedule 71.
- (e) Federal Supply Schedule 84.
- (f) Professional Services Schedule 99.
- (g) Federal Supply Schedule 738X.

538.7103 Contract clauses.

(a) Use FAR clause 52.212-4 Alternate I in all Federal Supply Schedules authorized for the acquisition of order-level materials (see 538.7101). Use the following language for the clause fill-in:

(1) Insert "Each order must list separately subcontracts for services excluded from the FSS Hourly.

(2) Insert "Each order must list separately the elements of other direct charge(s) for that order" in (i) (1) (ii) (D) (1).

(3) Insert "none" in (i) (1) (ii) (D) (2).

(b) Use 552.238-XX, Special Ordering Procedures for the Acquisition of Order-Level Materials in all Federal Supply Schedules authorized for the acquisition of order-level materials (see 538.7101).

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Add section 552.238-XX to read as follows:

552.238-XX Special Ordering Procedures for the Acquisition of Order-Level Materials.

As prescribed in 538.7103(b), insert the following clause:

SPECIAL ORDERING PROCEDURES FOR THE ACQUISITION OF ORDER-LEVEL MATERIALS
(DATE)

(a) Order-level materials means supplies and/or services acquired in direct support of an individual task or delivery order placed against a Federal Supply Schedule (FSS) contract or FSS BPA, when the supplies and/or services are not known at the time of Schedule contract award. The prices of order-level materials are not established in the FSS contract. Order-level materials that are acquired following the procedures in paragraph (d) of this clause are not open market items discussed in FAR 8.402(f).

(b) FAR 8.403(b) provides that GSA may establish special ordering procedures for a particular FSS or for some Special Item Numbers (SINs) within a Schedule.

(c) The procedures in FAR Subpart 8.4 apply to this contract, with the exceptions listed in this clause. If a requirement in this clause is inconsistent with FAR Subpart 8.4, this clause takes precedence.

(d) Procedures for including order-level materials when placing an individual task or delivery order against an FSS contract or FSS Blanket Purchase Agreement (BPA).

(1) The procedures discussed in FAR 8.402(f) do not apply when placing task and delivery orders for order-level materials.

(2) Order-level materials are included in the definition of the term "materials" in GSAR clause 552.212-4 Alternate I, and therefore all provisions of clause 552.212-4 Alternate I that apply to "materials" also apply to order-level materials. The ordering activity shall follow procedures under the Federal Travel Regulation and FAR Part 31 when order-level materials include travel.

(3) Order-level materials shall only be acquired in direct support of an order and not as the primary basis.

(4) The cumulative value of order-level materials awarded under an FSS order shall not exceed 33 percent of the total value of the order.

(5) All order-level materials shall be placed under the Order-Level Materials SIN.

(6) Prior to the placement of an order that includes order-level materials, the ordering activity shall follow procedures in FAR 8.404(h).

(7) To support the price reasonableness of order-level materials, the contractor proposing order-level materials as part of a solution shall submit a minimum of three quotes obtained by the contractor for each order-level material above the micro-purchase threshold. One of these three quotes may include materials furnished by the contractor under FAR 52.212-4 Alternate I (i) (1) (ii) (A) If the contractor cannot obtain three quotes, the contractor shall provide the rationale for why they cannot obtain

three quotes to support the contracting officer's determination in (d) (7) of this section.

(8) The ordering activity contracting officer must make a determination that prices for all order-level materials are determined fair and reasonable. The ordering activity contracting officer may base their determination on a comparison of the quotes received in response to the task or delivery order solicitation or other relevant pricing information available.

(9) Prior to an increase in the ceiling price of order-level materials above the micro-purchase threshold, the ordering activity contracting officer shall-

(i) Conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of the Government and obtain the approval at the levels described in FAR 8.405-6(d); or

(ii) Follow the procedures at FAR 8.405-6 for a change that modifies the general scope of the order.

(10) In accordance with GSAR clause 552.215-71 Examination of Records by GSA, GSA has the authority to examine the contractor's records for compliance with the pricing provisions in FAR clause 52.212-4 Alternate I, to include examination of any books, documents, papers, and records involving transactions related to the contract for overbillings, billing errors, and compliance with the IFF and the Sales Reporting clauses of the contract.

(11) Order-level materials are exempt from the following clauses:

(i) 552.216-70 Economic Price Adjustment - FSS Multiple Award Schedule Contracts.

(ii) 552.238-71 Submission and Distribution of Authorized FSS Schedule Pricelists.

(iii) 552.238-75 Price Reductions.

(End of Clause)

Billing code: 6820-61

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